United Nations A/68/115

General Assembly

Distr.: General
26 June 2013

Original: Arabic/English

Sixty-eighth session
Item 82 of the preliminary list*
Diplomatic protection

Diplomatic protection

Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.[1] In its resolution 61/35, the General Assembly took note of the draft articles as adopted by the Commission and invited Governments to submit comments concerning the Commission's recommendation that the Assembly elaborate a convention on the basis of the articles.[2] By its resolution 62/67, the Assembly commended the articles on diplomatic protection presented by the Commission, the text of which was annexed to the resolution, to the attention of Governments and invited them to submit any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles in writing to the Secretary-General. The Assembly decided to further examine, at its sixty-fifth session in 2010, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments,[3] as well as views expressed in the debates held at the sixty-second session of the Assembly, the question of a convention on diplomatic protection or any other appropriate action on the basis of the above-mentioned articles.

2. In its resolution 65/27, the General Assembly recalled its resolution 62/67 and the decision of the International Law Commission to recommend to the Assembly the elaboration of a convention on the basis of the articles on diplomatic protection. It also emphasized the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (*a*), of the Charter of the United Nations and noted that the subject of diplomatic protection

* A/68/50.

[1] See A/61/10, para. 49.

[2] See A/62/118 and Add.1.

[3] See A/65/182 and Add.1.

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was of major importance in relations between States. The Assembly commended once again the articles on diplomatic protection to the attention of Governments and decided to include in the provisional agenda of its sixty-eighth session the item entitled "Diplomatic protection" and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second and sixty-fifth sessions of the Assembly, to further examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles and to identify any difference of opinion on the articles.

3. In the same resolution, the General Assembly invited Governments to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the International Law Commission to elaborate a convention on the basis of the articles on diplomatic protection. By a note verbale dated 28 March 2011, the Secretary-General invited Governments to submit those comments no later than 1 June 2013. The Secretary-General reiterated that invitation by a note verbale dated 14 March 2012.

4. As of 26 June 2013, the Secretary-General had received written comments from Lebanon, the Philippines and Poland. Those comments are reproduced below, organized according to comments on any future action regarding the articles on diplomatic protection (section II) and on the articles on diplomatic protection themselves (section III).

II. Comments on any future action regarding the articles on diplomatic protection

Philippines

[Original: English]
[28 June 2011]

The Philippines has no objection to the negotiation of a convention on diplomatic protection.

Poland

[Original: English]
[3 June 2013]

The articles reflect the development of the institution of diplomatic protection in contemporary international relations. Diplomatic protection substantially supplements the existing universal and regional human rights protection treaty mechanisms. Since the articles contain new elements of progressive development of international law, it is suggested that they become a reference point for State practice and for developing international case law to reaffirm the existing law until sufficient support is generated for the idea of codifying them in an international treaty.

Poland recommends the continuation of the work on the articles in the General Assembly, along with the articles on the responsibility of States for internationally wrongful acts, since both legal instruments are closely linked and the articles on diplomatic protection do not regulate all the issues which are important for the exercise of this right by the State.

III. Comments on the articles on diplomatic protection

Philippines

[Original: English]
[28 June 2011]

There is no provision in the articles regarding the period to exercise diplomatic protection. There is no provision as to whether the exercise of the right may be barred by prescription, estoppel or laches. The exercise of the right being discretionary, and since the essence of the agreement is the exercise of a right, a time element should be provided, as it will be unfair and prejudicial on the part of the respondent State if the claimant State invokes the right only after a considerable length of time following the date of the injury.

The articles on diplomatic protection are closely connected with the articles on Responsibility of States for Internationally Wrongful Acts. Many of the principles contained in the articles on Responsibility of States for Internationally Wrongful Acts are relevant to diplomatic protection and are therefore not repeated in the present articles. Article 1 of the articles on diplomatic protection mentions "internationally wrongful" acts as the cause of the injury to a person by which the State of nationality of said person may invoke diplomatic protection, but there is no definition or enumeration of "internationally wrongful" acts within the document. The articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien.

Lebanon

[Original: Arabic]
[14 July 2011]

Lebanon is of the view that the concept of "diplomatic protection" as it appears in the articles does not have a defined framework and requires clarification. The concept of "internationally wrongful" acts is also not clearly delineated, and whether the wrongfulness in question derives from either multilateral or bilateral international agreements, from international jurisprudence, from the general principles of international law, or from international customary law should be clarified.

The articles do not give any practical or legal effect to the granting or withholding of diplomatic protection. They also do not specify the legal consequences for persons or assets granted such protection.

The elements of nationality are not based on objective standards, especially with regard to what is called "predominant nationality" and the basis on which that nationality is defined.

The articles do not use terms customary in international law, such as "*al-muhla al-ma'qulah*" (reasonable delay).

Further explanation is required of certain expressions appearing in article 15, including the following: "reasonably available"; "undue delay"; "no relevant connection"; and "manifestly precluded". In the Arabic translation of the articles, the word *almutadarrar* should be used instead of *almadrur* to denote an "injured person" and the word *ta'wid* should be used instead of *jabr* to denote "redress".

Poland

[Original: English]
[3 June 2013]

Poland welcomes the articles on diplomatic protection adopted by the International Law Commission in 2006. Special acknowledgement should be made to John Dugard, Special Rapporteur of the Commission, for his involvement in the drafting, in such a short time, of the articles, which play a significant role in contemporary relations.

The articles codify customary international law with respect to diplomatic protection and contain provisions manifesting the progressive development of international law. Diplomatic protection is a right that a State exercises by resorting to diplomatic action or other peaceful means of settling disputes to seek the responsibility of another State for injury caused by an internationally wrongful act committed by such State against a natural or legal person of the other State. The International Law Commission rightly concluded that a State may not seek responsibility for injury resulting from an internationally wrongful act by resorting to the threat or use of force against the territorial integrity or independence of any State, as stated in Article 2, paragraph 4, of the Charter of the United Nations.

Poland supports the development of the institution of diplomatic protection in the articles, seeing it as a human rights protection instrument. Diplomatic protection is an important instrument of customary international law exercised by States to ensure the protection of their nationals' rights abroad based on a universally accepted international law standard for the treatment of aliens. In contemporary international relations, this standard provides for the respect of human rights and fundamental freedoms as set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as in other universal and regional agreements. The United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the General Assembly in its resolution 40/144 of 13 December 1985, reaffirms the application of human rights that are guaranteed by international law with respect to aliens. In its judgment in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. the Democratic Republic of the Congo)* of 2007, the International Court of Justice clearly stated that "the standard of treatment of aliens" covers, "inter alia, ... guaranteed human rights". The exercise of diplomatic

protection in the event that another State violates guaranteed human rights means that the scope *ratione materiae* of diplomatic protection in contemporary international relations has been significantly extended. It should also be noted that diplomatic protection supplements rather than replaces other human rights protection instruments, in particular when such mechanisms are not available or are ineffective.

In order to ensure the proper exercise of diplomatic protection, a clear distinction should be made between diplomatic and consular protection. The commentaries on the articles should clearly identify situations in which diplomatic protection should be exercised, as distinguished from consular protection, to avoid misunderstandings and tensions between States in the process of their implementation.

In line with States' universal practice, the exercise of diplomatic protection is based on a bond of nationality that links a national to the State. The International Law Commission has rightly assumed in the articles that the holding of nationality by a person injured as a result of a wrongful act committed by another State is sufficient. However, the requirement of an effective bond of nationality may not represent an additional requirement for the exercise of diplomatic protection. In article 4, the Commission indicated the succession of States as one of the premises for acquiring nationality. However, it should be noted that nationality is not acquired through succession of States, but as a consequence of the succession of States. In the case of a succession of States, different premises may be applied for acquiring nationality. The article should be revised to reflect this point.

The articles extend the scope *rationae personae* of diplomatic protection to persons holding double or multiple nationalities and to stateless persons and refugees. In addition, they give the flag State the right to seek redress for the ship's crew, irrespective of the nationality they hold, if their injury results from an internationally wrongful act. This proposal put forward by the International Law Commission, which expresses progressive development of international law, merits support. In an increasingly globalized economy and with frequent migration flows, extending the catalogue of subjects eligible for diplomatic protection, as justified by the case law of international courts, will contribute to ensuring the free movement of persons, goods, capital and services across borders, and would limit the number of situations in which aliens would be deprived in the receiving State of legal protection on formal grounds. Article 7 rightly recognizes the criterion of predominant nationality which determines the exercise of diplomatic protection by one State of nationality against another State of nationality. This criterion was reflected in the most recent international instruments; it has been sustained in the judgements of international and arbitration courts. It also follows from the domestic law of most States. In article 8, the adoption of the criterion of lawful and habitual residence to the exercise of diplomatic protection in respect of stateless persons and refugees raises no objections.

Poland supports the insertion in article 19 of the rule that a State, in exercising diplomatic protection, should take into consideration the rights and interest of a national who was injured as a result of an internationally wrongful act committed by another State. The State should also give due consideration to the possibility of exercising diplomatic protection, especially if a significant injury has occurred; it should take into account, whenever feasible, the views of injured persons with

regard to the resort to diplomatic protection and the reparation to be sought. The State should also take into account the possibility of transferring to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions. Granting rights to individuals in the procedure of exercising diplomatic protection would limit the discretionary role of the State and would contribute to greater effectiveness of this institution.